No. 13,557

IN THE

United States Court of Appeals

For the Ninth Circuit

In the Matter of ALBERT LEONARD, ARNOLD DAVIS, SIDNEY DAVIS and WILLIAM GITZES, copartners, jointly and severally d/b/a Davis Furniture Co., DOYLE FURNITURE CO., INC., a corporation, LACHMAN BROS., a corporation, HARRY FRANK, an individual, d/b/a Milwaukee Furniture Company, A. EUGENE PAGANO and M. DE CASTRO, copartners, jointly and severally, d/b/a Mission Carpet and Furniture Co., FRANK NEWMAN CO., a corporation, SHAFF'S FURNITURE CO., a corporation, JOSEPH H. SPIEGELMAN and LEON SPIEGELMAN, copartners, jointly and severally, d/b/a San Francisco Furniture Co., STERLING FURNITURE COMPANY, a corporation, JAMES F. WILEY and VERNA M. GARDNER, copartners, jointly and severally, d/b/a J. H. Wiley The Furniture Man,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Set Aside Supplemental Decision and Order of the National Labor Relations Board and Cross-Petition for Enforcement of Said Order After Decision by the United States Court of Appeals for the Ninth Circuit.

BRIEF OF MASTER FURNITURE GUILD, LOCAL NO. 1285, AS AMICUS CURIAE IN SUPPORT OF POSITION OF RESPONDENT AND CROSS-PETITIONER NATIONAL LABOR RELATIONS BOARD.

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THE ISSUE.

In its opinion rendered upon remanding the instant case to the National Labor Relations Board for further action, this Court clearly defined the issue now here for resolution. The opinion stated:

> "Since we have held that the finding of the Board is not sustained by the evidence, the question arises whether we should determine if the Board's order may be sustained on the ground that it is illegal for the dealers to use the temporary lockout as a counter-economic power to that of the strike in a dispute between employer and employee involving wages and labor conditions." (Opinion, p. 5).

It must, however, be noted that this Court at another point in its opinion did inferentially characterize the issue in a somewhat different manner. Thus, first noting at some length the various references throughout the Labor Management Relations Act of 1947 to the use of the word "lockout," this Court said:

> "From the above expressions in the statute and the linking of the terms 'strike' and 'lockout', it is arguable that Congress has recognized strikes and lockouts as correlative powers, to be employed by the adversaries in collective bargaining when an impasse in negotiations is reached." (Opinion, p. 11).

In the expression first quoted above, this Court draws attention to "the temporary lockout as a *counter-economic* power to that of the strike in a dispute between employer and employee involving wages and

labor conditions" (emphasis added). In the portion of the opinion next quoted, attention is directed to the argument which considers the lockout in the sense of its being a *correlative power* to the strike.

The distinction between the lockout viewed (1) as a *counter-economic* power and (2) as a *correlative* economic power to that of the strike can be important when examined in the perspective of the statutory scheme and the record in the instant cause. We propose briefly to consider this distinction.

If the actual problem here presented was simply one of determining whether the lockout herein could, under the Act, be justified upon the assumption that the strike and lockout are perfectly "correlative" (i.e., mutual and reciprocal in all respects) powers, the answer would appear to be clear. Thus, there can be no doubt that an asserted power in the union to strike one employer because another employer has locked out his employees would, pursuant to Section 8(b)(4) of the Act, be rejected by this Court. Upon a basis of perfect parity, therefore, it would follow that a lockout by one employer in an effort to defeat a strike against another employer cannot be justified as the "corollary" to the "strike," as the latter is limited by the Act. The fact of the existence of the lockout as an employer instrument in industrial relations can be accepted as can the fact of the strike as a union weapon. Congress, as the Court notes in its opinion in this case, seems to have done so in certain general provisions of the Act just as it recognized the existence of the strike. However, by the acceptance of

strikes and lockouts as facts of industrial life, Congress did not thereby make all strikes or all lockouts legal. The recognition of a *general* right to lock out does no more to determine the legality of any *particular* lockout than does recognition of a general right to strike provide blanket immunity for any particular strike in question.

In the case of the strike it is obvious that the question of its legality can never be determined by simple reference to a Congressional "recognition" of the right to strike, but is always precisely a question of whether the particular strike under consideration runs afoul of Sections 8(b)(1), (2), (3), (4)(A), (4)(B), (4)(C), (4)(D), (5) and (6) of the Act. By parity of reasoning it seems clear that Congressional "recognition" of a general right to lockout, if in fact there be such recognition, cannot provide a key to a decision herein without reference to Sections 8(a)(1), 8(a)(2) and 8(a)(3) of the Act, wherein Congress stated with precision what in particular it has determined shall not be permitted to employers, either by means of lockout or otherwise.

And it must be noted that we are not, on the *record* herein, faced with the academic question of whether a general right to lockout has received Congressional recognition. The Board has found in the instant case, and the petitioning employers herein have admitted, that the lockout herein was conducted with the plain purpose and intent to "counter the effectiveness of the strike." Thus, the employers have admitted:

> "The only intent proven, or which could be found from the record in this case, is the intent of 'counter the effectiveness of the strike.' " (Petitioners' Reply Brief, Case No. 12,974, p. 23).

It is submitted that this Court squarely defined the issue actually presented by the record herein when it asked whether:

> " * * * the Board's order may be sustained on the ground that it is illegal for the dealers to use the temporary lockout as a counter-economic power to that of the strike in a dispute between employer and employee involving wages and labor conditions." (Opinion on Remand, p. 5).

The issue is whether the Board's finding of 8(a)(1) and (3) violations is sustained by the record and not whether Congress has recognized that there is such a thing in the arsenal of labor relations armament as a "lockout," undefined and unspecified as it may be in the statute. In other words, does the lockout, when used, as in this case, as an instrument to counter the effectiveness of protected concerted activities on the part of the union members, thereby become a particular kind of lockout which bears the stamp of illegality because of statutory regulation of such employer conduct?

THE VIOLATIONS OF SECTIONS 8(a)(1) AND (3) ARE NOT ONLY ESTABLISHED BY THE RECORD BUT ARE ADMITTED.

The Board in finding violations of 8(a)(1) and (3) has found in effect that the employers herein, by their lockout, did:

> (1) "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." (Sec. 8(a)(1)).
>
> (2) "by discrimination in regard to hire or tenure of employment * * * discourage membership in any labor organization." (Sec. 8(a)(3)).

The amazing, and somewhat startling fact, is that the petitioning employers herein have not at any point throughout these proceedings, either before the Board or this Court, argued that the lockout did not in fact *interfere with, restrain or coerce* the employees in their right to engage in protected activities. Petitioners have admitted that the strike against Union Furniture Company was in fact and in law a "protected"[1] strike (i.e., one in exercise of the rights guaranteed by Section 7 of the Act).

Nor has the Court upon an examination of the record herein found any reason to reject the Board's determination that the lockout herein did (indeed, was intended to) "interfere," "restrain" or "coerce" the employees in the exercise of rights guaranteed in Section 7 of the Act.

The correctness of this Court's finding to the effect that the lockout "was (not) a mere reprisal to defeat

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[1] "We are not concerned here with an illegal or non-protected strike." (Opening Brief, Case No. 12,974, p. 8.)

the strike against the individual member of the employers'' (Opinion, Case No. 12,974, pp. 3-4) is not here in question. Such finding did not in any way negate the Board's finding of ''interference,'' ''restraint'' or ''coercion''. That the lockout may be considered to have been motivated not simply as punishment of the employees because of the strike then in progress against Union Furniture, but rather as a blow against anticipated future strikes of the other employees or in support of the struck member employer, would compel the conclusion that it was not ''a mere reprisal.'' And this Court has so held (Opinion, Case No. 12,974, pp. 3-5). But the same considerations would in no way affect the determination that it was an ''interference'', ''restraint'' or ''coercion'' of the employees in the exercise of their Section 7 rights.

If the sole purpose of each of the locking out employers was no more than to lock out in anticipation of a strike personal to himself (which we do not concede) it seems evident that the finding of ''interference'', ''restraint'' or ''coercion'' is nevertheless obvious. That such future strikes would, if they had occurred, have been ''protected'' as was the strike against Union Furniture Company, is not denied. It will not, we believe, be suggested that an ''interference'' which rises to the level of a ''reprisal'' because directed at an existing exercise of Section 7 rights loses its quality of ''interference'' as well as its aspect of ''reprisal'' simply because directed at an anticipated *future* exercise of the

same rights. The Act was not designed with the limited goal of outlawing angry bursts of temper, but rather to insure that employees should not be subject to a economic pressure from their employers if they choose or desire to exercise the rights which Congress had decreed were vital to the nation's economic health. Whether the unlawful pressures are in *punishment* for completed activities or in *restraint* of future activities, they are alike forbidden.

The argument which petitioners make, therefore, recognizes, as it must, that "interference", "restraint" and "coercion" have in fact occurred. It seeks to assert, however, that such was nevertheless lawful because the "interference", "restraint" and "coercion" were indulged in not in a wanton spirit of revenge or reprisal, or in order to "bust the union," but solely to *"win," "resist"* or *"beat* the strike."[2]

Petitioners do not cite a single instance in which any Court[3] or the Board has held that "interference," "restraint" or "coercion" which would plainly be un-

---

[2]Petitioners have stated this view repeatedly and in a variety of ways; e.g.,

> "In plain language, the General Counsel cannot or will not distinguish between an intent to resist a strike and an intent to 'bust a union'." (Pettiioners' Reply Brief, Case No. 12,974, p. 2.)

and again,

> "The *intent* of the employer here is to *win* the strike or to *resist* the strike or to *beat* the strike; or, as the Court of Appeals for the Seventh Circuit expressed it, 'to counter the effectiveness of the strike,' whatever choice of language is preferred. It is a legitimate maneuver and measure in labor relations and an inherent and integral part of collective bargaining. It is not an unfair labor practice." (Supra, p. 4.)

[3]With the exception of the United States Court of Appeals, 7 Cir. in *Morand Bros. Beverage Co. v. N.L.R.B.*, 190 F. (2d) 576.

lawful if part of an effort to "bust" the union, is nevertheless proper if confined to a program of "busting" the union's strike. Rather they argue generally that:

> (1) The lockout is the lawful corrollary of the strike; that a strike is used to exert pressure on employers in order to bring them to terms, from which it follows that the lockout may be used against the employees in order to bring them to terms (i.e., to "beat" the strike).
>
> (2) That without regard to the legal quality of the lockout as the corrollary of the strike, existing legal doctrine recognizes that a lockout maintained in support of an "economic interest" of the employer is lawful.

The notion that the *particular* lockout herein is not illegal because of Congressional "recognition" of lockouts *in general* has been discussed above. That we are not here concerned with the question of whether Congress has or has not recognized lockouts, but quite precisely with whether the particular lockout in question constitutes a violation of Sections 8(a)(1) and (3) of the Act seems obvious. Upon the admission that the lockout was intended to "interfere" with an admittedly protected strike (indeed was launched with the purpose of beating that strike) further consideration of petitioners' first ground of argument above noted is no longer required.

The question remains whether the literal violations of Sections 8(a)(1) and (3) were none the less ex-

cused upon the grounds suggested by petitioners. In this connection petitioners have argued that the same "business necessity" which, in the face of strikes or threat of imminent strike, has excused a lockout designed to prevent spoilage of merchandise (*Duluth Bottling Association,* 48 N.L.R.B. 1335), or to prevent disappointment to customers from failure to complete promised repairs (*Betts-Cadillac-Olds, Inc.,* 96 N.L.R.B. 46), or to avoid productional difficulties arising in a multi-operational plant struck in one department, is likewise sufficient to justify or excuse the strike herein (Petitioners' Opening Brief, pp. 6-7). They assert that efforts to distinguish the lockout herein from those in the cases noted are misdirected; that to do so is to find "a distinction without a difference" (Petitioners' Opening Brief, p. 6). But the open, obvious and extremely important practical statutory difference is not destroyed by the mere denial that such exists.

In each of the Board cases upon which petitioners rely the employer conduct being tested was aimed at a business condition or circumstance *created by* or *resulting from* the protected activities of the employees, rather than *employer conduct aimed at those activities themselves.* The obvious distinction was long ago made clear by the United States Supreme Court when it pointed out that an employer confronted with a strike may properly replace the striking employees *in order to continue in production* and just as clearly cannot lawfully do so *in order to defeat the strike* itself (*N.L.R.B. v. Mackay Radio & Telegraph Co.,*

364 U.S. 333, 345). Thus, the decisions in question recognize only that an employer may, in face of a protected strike, take reasonable steps in order to continue in production and if continued production becomes impossible or economically hazardous may shut down to avoid loss; they do not contain the slightest hint that the Act authorizes either step in order to "break," "resist" or "defeat" the strike itself.

The distinction here noted is identical to that which permits an employer, for bona fide business reasons, to remove his plant from one geographical area to another (*Trenton Garment Co.,* 4 N.L.R.B. 1186), but makes the identical conduct unlawful where the purpose is to defeat the exercise of rights guaranteed by Section 7 (*N.L.R.B. v. Montgomery Ward & Co., Inc.,* 107 Fed. (2d) 555).

Petitioners have admitted that the lockout in question would have been unlawful if conducted for the purpose of or with the intent to "bust (the) union" (Petitioners' Reply Brief, Case No. 12,974, p. 2). And we agree. But there is not one section of the Act controlling *"union busting"* and a different section permitting *"strike busting."* A lockout designed to "bust the union" is unlawful because it constitutes an "interference," "restraint" or "coercion" of the employees' rights guaranteed by Section 7. And a lockout designed to break a strike is unlawful for exactly the same reasons and through precisely the same statutory analysis. The right to strike is guaranteed by

Section 7 of the Act. The right to join, form or assist a labor union is guaranteed by the same very section. And each is protected from employer interference by Section 8(a)(1).

If petitioners are correct in their argument that they can use economic force against their employees to defeat the strike conducted by the union to which these employees belong because the employers have a right to protect their "competitive position" or because of their "economic" interest in winning the strike, it must follow inevitably that the same justification would support a lockout designed to "bust the union," for the statutory protection is identical in both cases.

Simply stated, petitioners' argument is that Congress cannot have intended to deprive the employer of all his historical weapons designed to defeat or counter a strike against him, and, therefore, has not restricted his historical right to lock out in order to give battle and win. But even petitioners do not have the temerity to suggest that the Act does not wholly and completely strip the employer of every one of his historical weapons designed to discourage unionization. And the plain fact is that if Congress by Sections 7 and 8(a)(1) has commanded that the employer may not interfere with or restrain the unionization of his employees, it follows inexorably that he is likewise forbidden to interfere with or restrain (i.e., "counter") their strike once they have organized. Both the right to organize and the right to strike are me-

morialized by Section 7. Each is by Section 8(a)(1) declared to be protected from all forms of employer interference. If this Court is to hold that the kind of "economic necessity" argued for by petitioners justifies interference with the one right, it must necessarily follow that both are lawfully subject to attack by means of the employer lockout.

If upon the record herein it had been found that petitioners locked out their employees not to counter a strike but simply in order to gain an acceptable contract, we should be faced with a problem of a somewhat different nature. (See, e.g., Concurring Opinion of Board Member Murdock in *The Matter of International Shoe Company,* 93 N.L.R.B 159, 27 L.R.R.M. 1504). That an employer who discontinues his operation because he cannot obtain terms from his employees upon which he is willing or able to continue operations, may do so without impairment of his employees' rights under Section 7 can be assumed *sub arguendo* insofar as the present proceedings are concerned. But that is not the instant case.

Petitioners, as the Board has found (see Supplemental Decision and Order, p. 9), had no concern with any problem of inability to operate without a union contract. They did not even have the problem of being unable or unwilling to operate at the wages then being paid, for those wages were less by ten dollars per month than they had offered to begin paying immediately (T. p. 13, lines 22-23, Case No. 12,974). But for the strike at Union Furniture Co. it is obvious that

petitioners would have been willing, indeed happy, to continue the *status quo,* thereby saving to themselves the ten dollars per employee raise which they had offered in bargaining. The lockout was initiated not because there was a difference between what the employees were willing to accept and what the employers were willing to pay, but simply because the employees of one employer struck in order to enforce their demands. The question of the legal right of an employer to lock out in support of *his demand* for a contract incorporating the terms he desires remains undetermined under the law. But no such question is raised upon the record herein. The Board has so found and petitioners admit as much when they seek to distinguish this case from the admitted unfair labor practice cases *upon the sole ground* that whereas a discharge is plainly unlawful, a temporary layoff is not. In this connection, petitioners say:

> "From the inception of this case the petitioners have freely conceded that a *discharge* of employees for engaging in protected concerted activities is in and of itself an unfair labor practice. In fact this is the exact decision of the United States Court of Appeals for the Seventh Circuit in the *Morand Brothers* case. That Court, however, as did this Court, drew a distinction between a discharge and a temporary layoff, which the Board persists in ignoring." (Petitioners' Opening Brief, p. 3, emphasis by Petitioners).

It is apparently the view of petitioners that employer conduct nicely calculated to "beat a strike"

is sanctioned if it stops short of conduct which could have no purpose other than to "break the union." Petitioners do not, and the opinion of the *Morand Brothers* case does not, point out wherein the statute forbids an attack upon the union as such, but authorizes and permits an attack upon the union's strike. The reason for such failure lies, we believe, in the obvious fact that there is no rationalization of the statute by which a temporary layoff can be condoned and a discharge (both being for the same identical ends) is condemned. There is no statutory magic by which the differences in degree of "interference" between a temporary and permanent cessation of employment can be held to render the one lawful and the other unlawful. And petitioners have never sought to spell out in the terms of the applicable sections of the Act how the result which they urge can be accomplished.

Petitioners have argued that a denial of the right to lockout in the circumstances of this case has the effect of throwing labor relations back to the vicious practice of importing strike breakers, etc., and that it, therefore, follows that the Board's order must be set aside (Petitioners' Opening Brief, p. 13). Their suggestion is as legally erroneous as it is practically and historically unsound. If the employees whose rights are here in question had been on "strike," it is obvious that a lockout directed at them would have been absurd and pointless. The Board's order if followed will not lead to a substitution of the technique of em-

ploying strike breakers for the technique of remaining closed while each side tests the economic strength of the other; on the contrary, it will, by preventing the sympathetic lockout, drastically limit the conditions under which such choice of technique arises. This fact is borne out by the experience of Great Britain and Sweden to which petitioners themselves allude (Petitioners' Opening Brief, pp. 10-13). It is clear from the study cited by petitioners that employers of these nations have neither felt the need to employ strike breakers nor the lockout as a weapon against their employees. Instead when a strike occurs they merely *shut down* and do not attempt to operate during the test of economic strength brought on by the strike. This is not a lockout instituted to beat a strike, but rather a refusal on the part of the employer to exercise the choice of creating industrial warfare by the importation of strike breakers once a strike of the employees has been called. In the one case the employees are willing to continue working and are restrained from doing so by a lockout as in the instant situation, and in the other case the employees have gone on strike and the employer simply elects not to operate until his employees return to work. The first situation represents an attack upon the employees and an interference with their tenure of employment, and the second demonstrates a complete absence of such interference.

More importantly, however, should it be noted that we are here confronted with a statute. Whether the

policy which it expresses accords with petitioners' notions of industrial fair play or wisdom is not the queston. It is an act plainly designed to equalize the bargaining power between employee and employer by throwing the weight of government into the scales upon the side of the employees.[4]

The argument that the original Act may have so far accomplished its purpose of nurturing the growth of healthy and stable unions that it would be a wise bit of policy to permit the employer to counter a strike such as here in question by general lockout, as he would have been free to do prior to the passage of the original Act, is a consideration for the attention of Congress which wrote the statute. Until Congress has amended Sections 7 and 8(a)(1) and (3), that argument has no proper bearing upon any problem before this Court. And this is the answer to the great bulk of petitioners' argument throughout this case. Petitioners could be entirely right that industry wide bargaining has laudable objectives, that "small" employers benefit economically through pitting their combined strength against the union of their employees, and that

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[4]Section 1 of the Act provides in part as follows:

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries."

competitive conditions are stabilized through "master" contracts with labor. But these are arguments that should be addressed to Congress. They are neither germane to the problem of statutory interpretation here involved nor valid as considerations in judicial enforcement of an order of the National Labor Relations Board based upon findings of violation of specific provisions of the law in a particular case. The record in this case fully supports the Board's finding of interference, restraint and coercion within the meaning of Sections 8(a)(1) and (3) of the Act. No amount of justification of this illegal conduct on the part of petitioners on economic or social policy grounds can avoid this finding. Plainly, while the Act stands, the Board's order in this case should be enforced by a decree of this Court.

Dated, San Francisco, California,
March 27, 1953.

Respectfully submitted,
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